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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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Docket No. S-20631A-08-0503

In the matter of:

ROBERT FRANKLIN HOCKENSMITH, JR.,
CRD #1798614

Respondent.

**RESPONDENT ROBERT F.
HOCKENSMITH, JR.'S
REPLY IN SUPPORT OF
MOTION TO COMPEL**

(Oral Argument Requested)

Respondent replies in support of his motion to compel the Securities Division ("Division") to respond to Respondent's First Request for Production of Documents ("Request"). The Request is consistent with the Commission's Procedure Rules (A.A.C. R14-3-101 et seq.), previous Commission decisions, decades of Commission practice, and standards of due process and fairness.

I. The Commission's Procedural Rules allow discovery by incorporating the Civil Rules.

The Division states that "counsel for Respondent apparently think that the Commission should treat utility cases and securities cases the same" and that this position reflects the quixotic "whims of individual litigants."¹ Utility cases and securities cases should indeed be treated the same – because that's what the Commission's Procedure Rules direct. The Commission's Procedure Rules apply to "all cases before the Corporation Commission" including without limitation cases arising under Title 40 (utilities) and Title 44 (securities). A.A.C. R14-3-101.A. There simply isn't a separate, special set of rules for securities cases.

The Division does not even attempt to point to any difference in the Procedure Rules between utilities cases and securities cases. Instead, the Division points to A.R.S. § 44-2042, which governs confidentiality in securities cases. The Division's argument, then, is that the key difference between securities cases and utilities cases is that securities cases have a confidentiality

¹ Division Response at 2:2-3 and 1:23-24.

1 statute. That would be a great argument – except that there is a confidentiality statute for utilities
2 cases too. A.R.S. § 40-204.C requires that “no information” provided by utilities “shall be open to
3 public inspection or made public” except when authorized by the Commission. Both A.R.S. §
4 40-204.C and A.R.S. § 44-2042 are broad statutes that render information confidential, except
5 when public release is authorized by the Commission. If there is a difference between utilities and
6 securities cases, the existence of a confidentiality statute is not it.

7 The Division goes on to argue that the confidentiality statute means that discovery should
8 not be permitted. But long-standing practice under the utilities confidentiality statute shows that
9 this is not the case. Typically, counsel for the parties negotiate a protective agreement to govern
10 access to, and use of, confidential information. Respondent offers to enter into the standard
11 confidentiality agreement used by the Legal Division. If the Securities Division believes that the
12 Legal Division’s confidentiality agreement is inadequate, they could request the ALJ to enter a
13 protective order, as is often done in Commission cases when the parties cannot agree on a
14 protective agreement. These procedures are frequently invoked, and allow parties access to
15 confidential (and even “highly confidential”) materials.

16 Moreover, if the Division believes that specific documents are confidential, the proper
17 response is to designate the specific documents that are confidential, and provide the remaining
18 documents. The Division did not do this – it simply ignored the discovery request. Essentially, the
19 Division is contending that every single document in its possession is confidential. Such a
20 sweeping claim must be rejected.

21 The Division also points to numerous cases stating that civil procedure rules do not apply,
22 of their own force, to administrative proceedings. Their point is true, if obvious. But Respondent
23 has not claimed that the Arizona Rules of Civil Procedure apply, of their own force, to the
24 Commission. Rather, as noted in the motion to compel, the Civil Procedure Rules apply because
25 the Commission incorporated them into the Commission’s Procedure Rules. A.A.C. R14-3-101.A.

26 The Division also points to A.R.S. § 41-1062.A, which provides for limited discovery in
27 administrative “contested cases.” But that statute contains an exception – “except as provided by

1 agency rule,” and here the Commission’s Procedure Rules have incorporated the Civil Procedure
2 Rules.

3 The Division also uses A.R.S. § 41-1062.A to argue that subpoenas and depositions are
4 available only upon a “limited”² “reasonable need” standard, rather than the familiar “reasonably
5 calculated to lead to the discovery of admissible evidence” pursuant to Rule 26(b) of the Arizona
6 Rules of Civil Procedure. This argument runs afoul of Commission and ALJ orders using the
7 “reasonably calculated” standard in Commission cases, as cited in the motion to compel. The
8 Division’s argument also ignores the Commission’s procedural rules, which allow subpoenas and
9 depositions freely, without meeting any special standard. A.A.C. R14-3-109.O and -109.P.

10 Ignoring these rules concerning subpoenas and depositions, the Division claims that the
11 only discovery allowed under the Commission’s Procedure Rules is the exchange of witness lists,
12 exhibit lists, and exhibits.³ The Division then reasons that the existence of these specific rules
13 means no other discovery is allowed. But listing specific types of discovery does not ban other
14 types. Rather, the procedures for other types of discovery are “set forth neither by law, nor by these
15 rules, nor by regulations or orders of the Commission” and are therefore governed by the Rules of
16 Civil Procedure. A.A.C. R14-3-101.A.

17 Moreover, the Division’s argument proves too much – if their interpretation is correct, there
18 is no basis in the Commission’s Procedure Rules for the broad discovery allowed in utilities cases.
19 The Division’s interpretation runs counter to countless Commission Decisions and Procedural
20 Orders, some of which are cited in the motion to compel. Notably, the Division does not cite a
21 single Commission Decision or Procedural Order. A ruling that finds the Commission’s Procedure
22 Rules do not allow most discovery would truly be the “gift that just keeps giving” to Arizona’s
23 utility companies.

24 The Division attempts to bolster its case by relying on policy arguments. It contends that
25 allowing discovery would run against the “protection of the innocent” and the “integrity of the

26 _____
27 ² Division Response at 4:26

³ Division Response at 4:14-23.

1 regulatory process.” It does not explain how those concerns could not be satisfied by protective
2 orders or protective agreements. Nor does the Division explain how these concerns actually apply
3 to this case. The Respondent already has the addresses of his clients, many of whom remain with
4 him because they know his character and skill. The Respondent, Mr. Hockensmith, is a highly
5 decorated retired Army Colonel. He is not a threat to anyone – except this nation’s enemies. As a
6 Colonel, Mr. Hockensmith likely had access to highly classified material – yet according to the
7 Division their documents are so secret that he should not be allowed to even look at them.

8 The Division also complains that allowing discovery would force the Division “into the
9 position of a civil litigant” rather than “its proper role as a governmental regulatory authority.”⁴
10 But it is the Commission – not the Division – that is the regulatory authority. And the Utilities
11 Division manages to execute its delegated “regulatory authority” quite well despite having to
12 respond to discovery like any common “civil litigant.”

13 **II. Discovery should be allowed under due process and fairness.**

14 The Division argues that there is no constitutional right to discovery in an administrative
15 case.⁵ But due process requires disclosure of the “substance of the relevant supporting evidence”.
16 *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264 (1987)(4 justice plurality opinion) and 481 U.S.
17 at 269 (Justice Brennan concurring on this point); and 481 U.S. at 277-78 (Justice Stevens
18 concerning on this point, and noting that “Secrecy is not congenial to truth-seeking”). Thus, courts
19 have held that agencies must allow discovery where “a refusal to do so would prejudice the party as
20 to deny him due process.” *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

21 Further, when an agency has adopted discovery rules, it must follow them. *Pacific Gas and*
22 *Electric Co. v. FERC*, 746 F.2d 1383, 1387-88 (9th Cir. 1984); *see also Gibbons v. Arizona Corp.*
23 *Comm’n*, 95 Ariz. 343, 347, 390 P.2d 582, 585 (1964)(Commission must follow its own rules).
24 Here, the Commissions’ Procedure Rules incorporate the Rules of Civil Procedure, which allow for
25 discovery. Thus, the Commission must allow discovery.

26
27 ⁴ Division Response, Page 2, footnote 1.

⁵ Division Response, Page 3.

1 Moreover, in the absence of rules allowing discovery, the common law should be viewed as
2 allowing discovery “whenever it appear[s] necessary to promote fair hearings and effective judicial
3 review.” *Shively v. Stewart*, 421 P.2d 65, 68 (Cal. 1967).

4 Even if the Division were correct that discovery is not required by constitutional due
5 process, Commission rule, and common law, their position should still be rejected. The Division
6 essentially argues that they should be required to do only the bare minimum required by law. But
7 the Commission, as a matter of policy, may provide for more than the absolute minimum amount of
8 due process. Indeed, the Commission has often, and commendably, exceeded minimum due
9 process requirements on subjects such as public notice. Here, simple fairness requires that
10 Mr. Hockensmith have a chance to review the Division’s evidence concerning this case. As far as
11 we can tell, the Division has conducted an extensive investigation; at hearing the Division will
12 likely present only the evidence that most supports its case. Shouldn’t the Commission have the
13 chance to hear the “rest of the story?” If the Division’s case is meritorious, it can surely withstand
14 any scrutiny based on the very documents it has collected.

15 Moreover, on a practical level, sooner or later the Division will likely be required to provide
16 the documents. It may require repeated orders from the ALJ, as was the case in the Yucatan case,
17 Docket No. S-03539A-03-0000. It may require public records requests, and related litigation. And
18 if those options do not work, discovery will eventually be required in the Superior Court, upon
19 appeal of any decision in favor of the Division. It would be simpler, and more efficient, to order
20 the Division to provide the documents now; and allow the parties to get on with the business of
21 preparing for the hearing.

22 **III. Conclusion.**

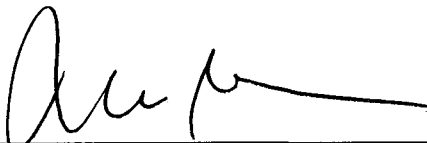
23 The Commission’s Procedure Rules incorporate the Civil Procedure Rules, which allow for
24 broad discovery. For decades, on this basis, the Commission has allowed broad discovery in
25 utilities cases. Yet under the Division’s interpretation, those same rules allow for little, if any,
26 discovery. The meaning of the rules does not change based on the identity of the Division. And
27

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1 fairness and due process support access to these documents. Accordingly, the ALJ should grant the
2 motion to compel.

3 RESPECTFULLY SUBMITTED this 17th day of April, 2009.

4 ROSHKA DeWULF & PATTEN, PLC

5
6 By 

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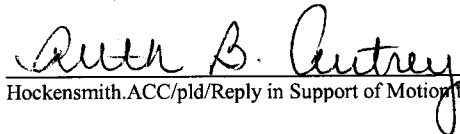
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